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In the Supreme Court of the United States

OCTOBER TERM, 1958

No.

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CLEAVER-BROOKS MFG. CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above entitled case on March 17, 1959.

OPINIONS BELOW

The opinion of the court of appeals (Appendix, *infra*, pp. 17-25) is reported at 264 F. 2d 637. The findings of fact, conclusions of law, and order of the Board (R.A. 93-102)[1] are reported at 120 NLRB 1135.

[1] "R.A." and "B.A." refer to the appendices filed by respondent (then petitioner) and the Board, respectively, in the court of appeals.

JURISDICTION

The judgment of the court of appeals (Appendix, *infra*, p. 26) was entered on March 17, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer, faced with conflicting claims of rival unions to represent his employees for purposes of collective bargaining, violates Section 8(a)(2) and (1) of the National Labor Relations Act if he recognizes one of them as the representative of the employees without waiting for the Board to resolve the rival claims under the procedures of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> Sec. 8(a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: * * *

* * * * * *

Sec. 9. * * * (c)(1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9(a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9(a); or

(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9(a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that

such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * * *

STATEMENT

The respondent Company's employees had not been represented by a union for several years. In October or November 1956, a Health and Welfare Committee was formed at the suggestion of Works Manager Leupold, composed of a representative for each department in the plant elected by the employees (R.A. 80; B.A. 98). Several members of this committee conceived the idea of an independent Union, and discussed their plans with Leupold (R.A. 80; B.A. 10-11, 96, 98-101). Following this conversation, they employed an attorney suggested by Leupold to draw up a charter, and called a meeting of the employees to consider it (R.A. 80; B.A. 92, 108). At the meeting, held on January 21, 1957, after a short discussion, the charter of the Independent [2] was approved, twenty-seven to seventeen, and signed by 35 out of approximately 47 hourly-paid employees of the Company (R.A. 71, 80-81; B.A. 92-94).

Prior to this meeting, on January 14, the Steelworkers [3] wrote the Company, claiming that they represented a majority of the plant's employees and requesting recognition as exclusive bargaining representative (R.A. 80; B.A. 8-9, 124). On the following day, they filed with the Board a petition for certification (R.A. 80; B.A. 127). By letter dated January 16, the

[2] Employees' Independent Union of Cleaver-Brooks Mfg. Corporation.

[3] United Steelworkers of America, AFL-CIO.

Company refused the Steelworkers' request for recognition (B.A. 125). On January 11, the Board's Regional Director issued a notice of hearing on the Steelworkers' petition (B.A. 129). On the same day, however, the Steelworkers and four previously-discharged employees filed unfair labor practice charges against the Company based on an incident not directly related to the representation question (R.A. 81; B.A. 130).[4] The Regional Director, pursuant to the Board's customary policy not to hold an election where there are outstanding unfair labor practice charges which might affect a representation election, postponed the representation hearing until after the disposition of the charges (R.A. 81; B.A. 130).

On January 24, 1957, the Independent filed a separate petition with the Board claiming that it was currently recognized as the bargaining representative and requesting that it be certified as such (R.A. 82; B.A. 131). On or about February 15, 1957, the Company entered into negotiations with the Independent at the latter's request culminating in the execution of a collective bargaining agreement, effective April 2, 1957 (R.A. 82; B.A. 16-17, 117). At no time after the Steelworkers' petition was filed did the Independent submit to the Company proof of the Independent's majority, but the Company admittedly recognized that union on the basis that it "understood" it had a majority (B.A. 16, 117).

---

[4] The incident involved the discharge of the four employees, on October 12, 1956, because of their protest against their assignment to a new foreman. The Board, in proceedings consolidated with those on the recognition issue presented here, found that the discharges were unfair labor practices (R. A. 77-79, 86-87, 94-95). The court of appeals held that they were not (*infra*, pp. 21-23). We do not seek review of that issue in this Court.

The Steelworkers, on February 15, 1957, filed unfair labor practice charges with the Board charging that the Company had contributed support to the Independent. After hearings, the Board, adopting the findings of the trial examiner (R.A. 80-84, 87), found that the Company, by recognizing and entering into a collective bargaining agreement with the Independent while a question concerning representation was pending before the Board, rendered unlawful assistance and support to the Independent in violation of Section 8(a)(2) of the Act, and interfered with the employees' freedom of choice of a bargaining representative in violation of Section 8(a)(1) (R.A. 95). The Board directed the Company to cease and desist from its unfair labor practices; to withold recognition from the Independent, and to cease giving further effect to the agreement with it, unless and until that union is certified as the collective bargaining representative of its employees; and to post appropriate notices (R.A. 99-102).

The court of appeals set aside the Board's order (*infra*, pp. 23-25). Although noting that "the Company and the Board agree that the employer's role is to withhold recognition while a question of representation exists, until an election has been held and one union is certified by the Board," the court adopted the Company's further contention that where "one union has clearly demonstrated its majority, the Act itself imposes on the Company the duty to award recognition to the representative clearly chosen by its employees." Such a showing, the court concluded, had been made here since 35 out of a possible 47 employees had signed the Independent's charter, and hence no violation occurred when the Company recognized the Independent.

despite the rival claim of the Steelworkers to represent the employees and the pendency before the Board of the representation petitions of both the Steelworkers and the Independent.

REASONS FOR GRANTING THE WRIT

1. The ruling below that the Company was free to recognize the Independent as the employees' bargaining representative, despite the rival claim of the Steelworkers to represent them and the pending representation petitions filed by both unions with the Board, is in conflict with the decisions of the Sixth Circuit in *Hoover Co.* v. *National Labor Relations Board*, 191 F. 2d 380, 385-386, and *Ohio Ferro-Alloys Corp.* v. *National Labor Relations Board*, 213 F. 2d 646, 650, and the decision of the Second Circuit in *National Labor Relations Board* v. *Electronics Equipment Co.*, 194 F. 2d 650, 652; 205 F. 2d 296. See also *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2). Contrary to the ruling below, both of these courts have held that where, as here, an employer is confronted with rival representation claims, the duty of neutrality which the statute imposes requires it to refrain from recognizing one of the competing unions until the Board has determined its representative status.[5]

[5] The precise issue in the *Hoover*, *Ohio Ferro* and *Electronics Equipment* cases was whether strikes and boycotts designed to force recognition of one of two rival unions were "protected" by Section 7 of the Act so that the participating employees could not be discharged. That question, however, was deemed to turn on whether the employer's compliance with the demands for recognition would have been an unfair labor practice. Thus in each case the court's holding that it would have been an unfair labor practice for the employer to recognize the union pending the Board election was a necessary part of the decision. In *National Container*, the court held it to be an unfair labor practice for an employer

The importance of the question in the administration of the Act cannot be doubted. During the fiscal year ending in June 1958, the Board conducted approximately 600 representation elections involving two or more rival labor organizations.[6] Every such situation involves the question of the employer's duty, in the face of the rival claims, to recognize or refrain from recognizing one of the contending unions pending the outcome of the Board's representation proceedings. And both the courts of appeals[7] and the Board[8] have repeatedly had occasion to deal with this problem. In these circumstances, resolution of the question by this

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to recognize a union which had won a Board election before the Board had resolved objections to the election filed by the rival union. Although that case is arguably distinguishable on its facts, since the employer was also found to have committed unfair labor practices prior to, and invalidating, the election, the court based its decision on the more general ground that recognition was improper so long as a substantial question of representation remained unresolved.

[6] National Labor Relations Board, Twenty-third Annual Report, p. 155.

[7] In addition to the cases cited *supra*, p. 7, see *District 50, UMW* v. *National Labor Relations Board*, 234 F. 2d 565 (C.A. 4); *National Labor Relations Board* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (C.A. 7); *National Labor Relations Board* v. *Standard Steel Spring Co.*, 180 F. 2d 942 (C.A. 6); *National Labor Relations Board* v. *The Wheland Co.*, now pending in the Sixth Circuit, No. 13792.

[8] The following is a partial list of the more recent cases before the Board dealing with the problem: *Shea Chemical Corp.*, 121 NLRB No. 129; *Pittsburgh Valve Co.*, 114 NLRB 193; *Jersey Contracting Corp.*, 112 NLRB 660; *The Wheland Co.*, 120 NLRB 814; *Novak Logging Co.*, 119 NLRB 1573; *Scherrer & Davisson Logging Co.*, 119 NLRB 1587; *A. O. Smith Corp.*, 122 NLRB No. 49; *Alaska Salmon Industry, Inc.*, 98 NLRB 1203; *Indianapolis Newspapers, Inc.*, 103 NLRB 1750; *Western Lace & Line Co.*, 103 NLRB 1408; *The Standard Transformer Co.*, 97 NLRB 669; *Sunbeam Corp.*, 99 NLRB 546; *National Container Corp.*, 103 NLRB 1544.

Court would appear to be both desirable and appropriate.

2. The Board has consistently ruled that an employer, faced with substantial representation claims of rival unions, may not recognize either of them until the employees have had an opportunity to make their choice under the safeguards of a Board-conducted election.[9] An employer who disregards this obligation, particularly where the Board's election machinery has already been invoked, and prematurely recognizes one of the rival unions interferes with his employees' statutory freedom to select a bargaining representative of their own choosing, in violation of Section 8(a)(1), and accords illegal support to the favored union in violation of Section 8(a)(2). As the Sixth Circuit has twice stated (*Hoover Co., supra; Ohio Ferro-Alloys, supra*):

> Under the Act, when a petition is filed by an employee or a group of employees alleging that a substantial number of employees wishes to be represented for collective bargaining, the Board is directed to investigate such petition, and if it has reasonable cause to believe that a question of representation affecting commerce exists, it is further directed to provide for an appropriate hearing upon due notice; and if it finds that such a question of representation exists, it is required to direct an election by secret ballot and to certify the results thereof. * * * If, during the pendency of these proceedings for an election to determine the bargaining agent, [the employer] had recognized [one

[9] See n. 8, *supra*. The rule in Board parlance is known as the *Midwest Piping* rule and derives from *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060, where it was first explicated.

> of the competing unions], as bargaining agent, it would have been guilty of an interference with the Board's election procedures, as well as an unfair labor practice, in violation of Section 8(a)(1) of the Act, for interfering with, and restraining its employees in the exercise of their right of self-organization and the right to bargain through a representative of their own choosing. For an employer is obliged to remain neutral and can not recognize or bargain with one of the two or more unions competing for such recognition during the pendency of a representation proceeding.

The Second Circuit expressed similar views in *Electronics Equipment Co., supra.*

The rule that the statute forbids such premature recognition is simply a specialized application of the long-recognized doctrine requiring strict employer neutrality in matters relating to the employees' choice of a bargaining representative and prohibiting an employer, when faced with conflicting claims, from according such treatment to one of the rivals as will give it an improper advantage or disadvantage in the contest for the employees' favor. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U.S. 206, 226. Since granting exclusive recognition to a union under such circumstances constitutes strong support, the employer violates his duty of neutrality and impairs the employees' freedom of choice by a premature resolution of the representation question. Accordingly, effectuation of the underlying policies of the Act requires the employer to stay his hand until the employees' choice has been determined through the

safeguards of a Board-conducted secret election rather than on the basis of proof which the employer deems sufficient but which is not necessarily conclusive.

3. The court below appears to acknowledge that where rival unions are competing for recognition "the employer's role is to withhold recognition while a question of representation exists, until an election has been held and one union is certified by the Board" (*infra*, p. 24). The court holds, however, that, once it appears that one of the rival unions has made "a clear showing of majority representation," no question of representation exists. Hence, the court concludes, the employer need not await the outcome of a Board election but may, indeed must, accord recognition to the union making such a showing. This conclusion rests on a basic misconception as to when a "question of representation" exists in this context, and in fact devitalizes the general rule of employer neutrality in such situations which the court purports to recognize.

Where rival unions are making substantial claims to represent the employees, the claims, in the absence of a Board determination of the representative status of the competing unions, rest upon such evidence as authorization or membership cards or other informal indicia of support. The Board has had occasion to note that such indicia of the employees' wishes "are a notoriously unreliable method of determining majority status of a union" where rival unions are campaigning for employee support. *Sunbeam Corp.*, 99 NLRB 546, 550. During rival organizing drives the sentiments of individual employees may, and often do, fluctuate widely for or against a particular union. Employees frequently sign cards or petitions favoring

more than one union. As the Board has concluded from its experience in this field,

> * * * it is well known that membership cards obtained during the heat of rival organizing campaigns * * * do not necessarily reflect the ultimate choice of a bargaining representative; indeed, the extent of dual membership among the employees during periods of intense organizing activity is an important unknown factor affecting a determination of majority status, which can best be resolved by a secret ballot among the employees.[10]

It is thus plain that at one time or another during such organizing periods one of the rival unions may be able to make a showing of the allegiance of a majority of the employees. But such a showing, as experience demonstrates, is not necessarily conclusive or determinative of the representation question. The situation continues to be fluid and each successive day may present a different picture of employee attitudes; the employees' sentiments as to their choice of bargaining representative have not become truly crystallized; and the indicia of majority support which any of the rival unions may adduce are therefore far from a reliable index of the employees' wishes. In the light of these factors, until a Board election affords the employees an opportunity to express their deliberate choice, a question of representation, that is to say, a serious doubt concerning the employees' ultimate choice of bargaining representatives, continues to exist despite

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[10] *Midwest Piping*, 63 NLRB 1060, 1070; *Sunbeam Corp.*, 99 NLRB 546, 550-551.

any "clear showing of majority representation." And an employer may not fairly assume to judge for himself which of the rival unions is the statutory representative of the employees.

4. The uncertainty concerning the employees' choice of representatives which thus necessarily arises where rival unions are involved is further accentuated where, as here, valid petitions have been filed invoking the Board's power to resolve the issue. The Act provides that whenever an individual, labor organization, or employer petitions the Board to determine the representative status of one or more labor organizations for purposes of collective bargaining, the Board shall investigate such petition and, if it determines that a question of representation exists, shall direct a secret election and certify the results (Section 9(c)). The filing of a valid representation petition for certification presumptively establishes the existence of a question concerning representation and the employer is put on notice of its existence. The Act requires a labor organization filing such a petition to make a *prima facie* showing that it represents "a substantial number of employees" and further requires the Board before setting down the case for hearing to "investigate such petition" to determine whether there is "reasonable cause to believe that a question of representation exists," and a hearing is directed if the Board finds that such a question exists. The filing of such a petition by one or more of the rival unions serves to apprise the employer that the representative status of any of them has not been so definitely resolved that he may fairly undertake to extend recognition on the basis of membership or authorization cards or other informal evidence

of majority support. In other words, the filing of valid petitions invoking the power of the Board to resolve the representation question serves as notice to the employer that the question is far from settled, despite any showing of majority support by any of the contending unions which he may deem satisfactory.

This is particularly true where, as here, the Board directs a hearing on such a petition. Under its rules, the Board does not entertain such a petition unless the petitioning union has been designated by at least 30 percent of the employees. Sec. 101.18, National Labor Relations Board, Statements of Procedure, Series 7. Since the Regional Director issued a notice of hearing on the Steelworkers' petition (*supra*, p. 5),[11] the Steelworkers presumably made such a showing. Such an administrative showing of interest serves to confirm that the rival representation claims have substance and therefore a question concerning representation exists.

If the employer is permitted to resolve that question by a recognition of one of the rival unions without waiting for the Board to determine the issue, all he need do is watch the ebb and flow of sentiment and once the favored union commands a majority, however transient, extend to it the powerful support of his recognition. The consequence is that it is the employer, not the employees, who, in a very real sense, has determined their bargaining representative. The in-

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[11] The hearing was subsequently postponed because of the filing of unfair labor practice charges over the discharge of several employees (*supra*, p. 5). The Board normally takes such action because a fair election cannot be conducted if the employees are the victims of unredressed unfair labor practices. We do not believe that this fortuitous circumstance weakens the considerations we advance above.

terest of an employer in according recognition to the union chosen by a majority of the employees, and thereby stabilizing his labor relations as promptly as possible, is not, of course, to be minimized. On the other hand, the employees' basic right to bargain through representatives of their choice is seriously endangered if the employer is permitted to determine the choice on the basis of a showing which cannot be deemed to be necessarily conclusive. The rule which the Board has adopted to govern these situations, namely, that the employer withhold recognition until the representation question has been settled through the statutory procedures, strikes a proper balance between the competing interests.[12]

[12] Under the Board's current practice, the time lapse between the filing of a representation petition and the holding of an election is approximately 34 days where there are no contested issues and the parties consent or stipulate to the holding of an election. In contested cases which involve a hearing and a Board decision and direction of election, the average lapse of time between the filing of the petition and the election is approximately 100 days.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

J. LEE RANKIN,
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JUNE 1959.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1958—JANUARY SESSION, 1959

No. 12429

CLEAVER-BROOKS MFG. CORPORATION, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

March 17, 1959

Petition to Review and Set Aside an Order of the National Labor Relations Board

Before SCHNACKENBERG, PARKINSON, and KNOCH, *Circuit Judges*

KNOCH, *Circuit Judge.* Cleaver-Brooks Manufacturing Corporation (hereinafter called the "Company") seeks to set aside an order of the National Labor Relations Board (hereinafter called the "Board") to reinstate Claire A. Houk, Thomas Zivkovich, Carl J. Holston, and Carl R. Olson, discharged employees with back pay; to withdraw recognition from Employees Independent Union of Cleaver-Brooks (hereinafter called the "Independent") as the collective bargaining representative of its employees pending certification of a representative; and to post certain notices. In its answer the Board has prayed enforcement of its order.

This Court acquires jurisdiction under the National Labor Relations Act, as amended, (29 U.S.C.A., Sec. 151 *et seq.*) Sec. 160, sub-sections (e) and (f).[1]

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[1] § 160: Prevention of unfair labor practices

* * * * * *

Petition to court for enforcement of order; proceedings; review of judgment

(e) The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which ap-

The facts are largely undisputed.

The Company, a wholly-owned subsidiary of another Wisconsin corporation, Cleaver-Brooks Company, operates a plant in Waukesha, Wisconsin, where it manufactures water distilling units, special products, and tooling for its parent corporation at Milwaukee, whose works manager, Glenn W. Leupold, also exercised management control of the Company.

In May, 1956, Leupold found that the welders em-

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plication may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive and shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record

ployed in the Waukesha plant lacked proper supervision and control with respect to assignment of work and loitering on the job. The welding foreman from the Milwaukee plant, after a week's inspection visit, reported that the welders were actually working an average of approximately two and one-half hours per 8-hour day. One of the difficulties arose in connection with leadman, Claire Houk, who admittedly regarded himself as an overseer rather than a production worker, although the works manager wanted him to work along-

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with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate United States court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Review of final order of Board on petition to court

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Board, and thereupon the aggrieved party shall file in the court the record in the proceeding, certified by the Board, as provided in section 2112 of Title 28. Upon the filing of such petition, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section, and shall have the same jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive. As amended Aug. 28, 1958, Pub. L. 85-791, § 13, 72 Stat. 945.

side the other welders and not to direct their activities, except when instructed to do so by the foreman.

During the spring and summer of 1956, the Company's workload had been augmented by two sizable Government contracts which were nearing completion. The number of hourly paid employees in the plant declined from a minimum of 80 in June and July, to a minimum of 47 in October. In November employees were stabilized at approximately 47 in number.

Effective October 10, 1956, Foreman Schwager was relieved of his jurisdiction over the welders. The new foreman was Frank Unold, who had been and continued as foreman of the Assembly department. Announcement of the change of foreman met with opposition.

Schwager testified that Carl R. Olson threw down his tools, and, using very intemperate language, said he would never work for the new foreman. All 15 welders left their place of work. There was a work stoppage of about 20 to 25 minutes. Schwager testified that Carl Holston and Thomas Zivkovich said they wouldn't work for the new foreman. Chester Tambert, production manager, promised to arrange a conference with the works manager, and the men all returned to work. Zivkovich, on cross examination, testified that he and Olson undertook to see Schwager to tell him they decided not to have Unold as their foreman, and to arrange a protest meeting with management.

At the meeting, after discussing the matter, Leupold declined to reconsider his appointment of Unold as foreman. Leupold testified regarding a later interview with Houk alone, at which Houk exhibited a "general attitude and indifference" toward the new foreman which convinced Leupold he would never accept or try to get along with Unold.

Following the protest meeting Leupold discussed the situation with the Vice President and decided to dis-

charge Houk, Zivkovich, Holston and Olson. Tambert testified that he told all four that their attempt "to intimidate and influence management in selection of their supervisory personnel . . . left a bad taste in the Company's mouth . . ." and that none of the men protested the termination of their employment. He also testified to marked improvement in efficiency under the new foreman. Tambert and Leupold testified that decrease in volume of business made reduction in work force necessary; that these particular four men were discharged because they had shown that they would never accept any foreman placed over them. No new employees were hired to replace them.

The Board found that the Company discharged the four for engaging in a concerted activity for mutual aid and protection in protesting the appointment of a new foreman, a protected activity under Sec. 7 of the Act; that these were discriminating discharges, tending to discourage employees in the exercise of their rights in violation of Secs. 8 (a) (1) and 8 (a) (3).

The Board concluded that, in any event, notwithstanding the temporary work stoppage and use of intemperate language, the welders had all returned to work and that the Company had failed to assert any right (if any existed) to discharge employees for misconduct.

The evidence, however, clearly showed that the Company, faced with the necessity of laying off welders for lack of work, singled out those who had shown unwillingness to accept the new foreman. The fact that the four and other employees also participated in a protest meeting does not of itself bring the concerted activity within the scope of Sec. 7.

The Act does not protect activities during working hours which disturb the efficient operation of the Com-

pany's business. *Caterpillar Tractor Co. v. N.L.R.B.*, 230 F. 2d 357 (C.A. 7, 1956).

The Board takes the position that protest over the appointment of a foreman is a concerted activity protected by the Act, citing as authority our ruling in *N.L.R.B.* v. *Phoenix Mutual Life Insurance Co.*, 167 F. 2d 983 (C.A. 7, 1948), cert. den. 335 U. S. 845.

The *Phoenix* case is easily distinguished from the case before us. There no work stoppage, intemperate language, or refusal to accept supervision was involved. Several insurance salesmen were discharged for becoming involved, apparently on their own time, in drafting a letter, proposed to be submitted on behalf of all salesmen, recommending the assistant cashier to fill the vacant post of cashier. The four men discharged here adopted no such moderate conduct in making known to management their views on, not a vacancy, but an appointment already made, in which the Board contends they had a legitimate interest.

The Board, on the other hand, sees a distinction between this case and *N.L.R.B.* v. *Reynolds International Pen Co.*, 162 F. 2d 680 (C.A. 7, 1947) and *Fontaine Converting Works, Inc.*, 77 N.L.R.B. 1386 (1948) wherein employees who struck in protest over demotion of a foreman were held not protected by the Act. We cannot agree. Otherwise, on the facts of this case, one would have to argue that it was in the employees' legitimate interest to maintain the inefficient and inadequate supervision previously provided. The evidence showed a mere personal antipathy to Unold, whose experience and qualifications were not demonstrably inferior to those of Schwager and Houk. It is conceded that appointment of the foreman was not a bargainable issue. The Board's conclusion that the four were discharged as spokes-

men is not supported by the Trial Examiners' findings of fact.

We find no merit in the contention that delay in notification of discharge for some two days' time resulted in "condonation" of misconduct. The Company was obliged of necessity to cut its work force. The choice of personnel to be discharged was made after consultation and consideration. The mere fact that all fifteen welders returned to work did not automatically eradicate relative attitudes of cooperation or insubordination among them.

The Company was also charged with premature recognition of the Independent; the Board found that the Company on January 16, 1957, rejected request for recognition from United Steelworkers of America (hereinafter called the "Steelworkers") whereupon the latter filed a petition with the Board for certification. Notice of hearing to determine representation was issued.

On January 21st, the Independent was formed. It also filed a petition with the Board.

After the International Association of Machinists had lost a Board conducted election on February 4, 1955, a Health and Welfare Committee had been formed in the Company, which as early as December, 1956, discussed a possible independent union. The Committee employed legal counsel, who drew up a proposed charter. The Board stresses the fact that the Committee engaged counsel recommended by Leupold. There was no evidence to show the counsel was connected in any way with the Company. At least one witness testified that Leupold did not suggest his name. A meeting was called for the evening of January 21, 1957, off the premises of the Company.

The same day Houk, Zivkovich, Holston and Olson (all members of Steelworkers) filed charges under

Sec. 8.a(1) and (3) discussed above, and, pursuant to established Board practice, the representation hearing was postponed.

At the meeting, the proposed charter was adopted by a vote of 27 to 17. Holston and Zivkovich, present and voting, (although no longer employees) urged affiliation with Steelworkers. They then left the meeting to return shortly with representatives of Steelworkers and the Machinists Union (voted out earlier) who criticized formation of an independent union. One of them attempted to destroy the charter document. A scuffle ensued and the police were sent for. After the visitors left, about thirty-five employees signed the charter as charter members.

On February 2, 1957, counsel for the Independent wrote the Company regarding negotiation of a collective bargaining agreement. The Board contends that the Independent did not show the Company authorization cards or other proof of its majority. The Company, however, knew of the charter. Leupold testified that a number of employees (naming them) had told him about the January 21st meeting.

On or before February 15, 1957, the Company recognized the Independent and entered into negotiations culminating in an agreement effective April 2, 1957.

The Board concluded that this assistance and support to Independent interfered with the employees' free choice of a bargaining representative in violation of Sec. 8 (a) (1) and (3).

Both the Company and the Board agree that the employer's role is to withhold recognition while a question of representation exists, until an election has been held and one union is certified by the Board.

However, the Company argues that when one union has clearly demonstrated its majority, the Act itself imposes on the Company the duty to award recognition

to the representative clearly chosen by its employees. *N.L.R.B.* v. *Indianapolis Newspapers, Inc.*, 210 F. 2d 501 (C.A. 7, 1954).

Signatures of thirty-five out of a possible forty-seven employees indicates such a clear showing of majority representation.

The Board suggests that the Company has, in effect, observed the ebb and flow of fluctuating sentiment and made timely recognition of the favored union. The facts contradict such finding here. The Company postponed negotiation until pressed by the Independent whose membership, as represented by signatures to the charter, showed Steelworkers to be no genuine contender.

This cause was heard and considered solely on the transcript of record certified by the Board, including the stenographic transcript of the testimony, without reference to the narrative statement which the Board has moved to strike. The Board's motion was based on *N.L.R.B.* v. *Foote Bros. Gear & Machine Corp.*, 311 U.S. 620 (1940), which reversed this Court's judgment because the petition was based on a narrative statement of evidence.

The Board's motion for reconsideration of its motion to strike the Company's aforesaid narrative statement of the facts is granted, and the first sixty-seven pages of the Company's Appendix is accordingly ordered stricken from the record. No further printed record is ordered.

We conclude that the Board's findings are not substantially supported. We find that the Order of the Board is erroneous and must be set aside.

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Tuesday, March 17, 1959

BEFORE: Hon. ELMER J. SCHNACKENBERG, Circuit Judge; Hon. W. LYNN PARKINSON, Circuit Judge; Hon. WIN G. KNOCH, Circuit Judge.

No. 12429

CLEAVER-BROOKS MFG. CORPORATION, PETITIONER,

vs.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

Petition for Review of an Order of the National Labor Relations Board

This cause came on to be heard on the petition to review and set aside an order of the National Labor Relations Board, the answer to said petition for review and cross-petition for enforcement, the petition of the National Labor Relations Board for reconsideration by the Court of the motion to strike petitioner's appendix, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the decision of the National Labor Relations Board entered in this case on May 26, 1958, be set aside, in accordance with the opinion of this Court filed this day.

It is further ordered and adjudged by this Court that the petition of the National Labor Relations Board for reconsideration by the Court of the motion to strike petitioner's appendix be granted, and the first sixty-seven pages of the appendix of the Cleaver-Brooks Mfg. Corporation is ordered stricken from the record. No further printed record is ordered.

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